Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-

MARK-GARNER ASSOCIATES, INC.,

Petitioner,

v.

BENSALEM TOWNSHIP and STEPHEN J. KELLY, THEODORE R. ZAJAC, WILLIAM McFADDEN, HERBERT BRADEN, and DONALD BELL, Individually and in Their Official Capacities as the Board of Supervisors of Bensalem Township and STANLEY HOROWITZ, Individually and in His Capacity as Zoning Officer of Bensalem Township,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, Mark-Garner Associates, Inc. ("Mark-Garner"), requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on February 21, 1980.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit, No. 79-1361, not reported, is set forth in the Appendix to this Petition at pages A1 to A34.

The opinion of the United States District Court for the Eastern District of Pennsylvania, not reported, is set forth in the Appendix at pages A35 to A50.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on February 21, 1980. This Petition is filed within 120 days of that date, by leave of Justice Brennan granted May 22, 1980. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Should the Court let a dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure stand where the Court of Appeals erroneously applied the "rational relation" test by assuming that there was a legitimate purpose behind a local ordinance in direct and unsupported contradiction to Petitioner's allegations that there was an express illegitimate and invidious purpose motivating the local legislative body?

2. Should this Court permit a facially neutral zoning ordinance to be applied so that it discriminates against a particular class of real estate developers?

3. May the Petitioner be denied its day in court as a result of the application by the Court of Appeals of an erroneous standard of specificity to Petitioner's Crossclaim where the standard conflicts with the decision of this Court in *Scheuer v. Rhodes*, 416 U. S. 232 (1974), and establishes an untenable precedent in civil rights litigation?

4. Should this Court allow the Court of Appeals to sanction the taking of Petitioner's property without compensation, absent any legitimate state interest for the action and without permitting Petitioner to present its claim in court?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Amendment V of the United States Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, section 1, of the United States Constitution provides in relevant part:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

42 U. S. C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U. S. C. § 1985(3) provides:

> If two or more persons in any state or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U. S. C. § 1986 provides:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case . . .

STATEMENT OF THE CASE.

Petitioner Mark-Garner was a real estate developer in Bensalem Township, Bucks County, Pennsylvania. As a result of the illegal actions of the Township Board of Supervisors, who conspired with the Zoning Hearing Board and Zoning Officer (together referred to as the "Township defendants"), Petitioner was prevented from completing a moderate-cost condominium development known as Bensalem Village. Petitioner ultimately was put out of business, losing most of its investment in the project.

Petitioner has contended in the courts below that the Township defendants violated its constitutional and statutory rights by amending the local zoning ordinance with the express purpose of preventing the completion of Bensalem Village and similar developments, and of putting Petitioner and others similarly situated out of business. Petitioner has never been granted the opportunity to present its claims, or even to develop evidence to support those claims. By this petition Mark-Garner seeks review of the denial of its day in court.

In 1972, Petitioner purchased approximately 50 acres in Bensalem Township and submitted plans to the Board of Supervisors for a 557 unit condominium project. On May 16, 1973 the Board of Supervisors granted final approval of the plans,[1] and Petitioner commenced construction immediately.

Between May of 1973 and September of 1976 Mark-Garner constructed and sold 106 of the proposed 557

1. As required by Pennsylvania law, Petitioner filed a "Condominium Declaration" and a statement of "Rules and Regulations for Bensalem Village" after final approval was granted. After the Declaration was filed and buyers had purchased in reliance thereon, Mark-Garner was legally obligated to complete the project in accordance with its terms.

dwelling units. As construction proceeded during this period, Petitioner repeatedly applied for and received building permits.

In addition, Mark-Garner made substantial progress on the common area improvements,[2] which had been required by the Township authorities in order to obtain final plan approval. In total Mark-Garner had invested more than three million dollars in Bensalem Village by September of 1976.

On September 24, 1976, Petitioner routinely applied for 12 building permits, and for the first time its request was denied. The Township Zoning Officer informed Mark-Garner that the plan for the Village no longer complied with the Township's zoning ordinance. That ordinance had been amended to "down zone" the density of the R-4 District, which applied to this project. The amendment had been passed approximately one month after the Supervisors had approved the original plan, and more than three years prior to the permit denials. This amended density requirement had never been applied to Bensalem Village throughout the three year construction period, although there had been repeated opportunities to do so. Petitioner appealed the Zoning Officer's decision to the Zoning Hearing Board.

Shortly thereafter, the Board of Supervisors again lowered the permissible density in the R-4 District. As a result of the two zoning amendments, the total number of

2. These improvements included installation of sanitary sewer and storm water facilities to service 490 units; installation of 30% of the required perimeter chain link fence; installation of 30% of the requisite street lighting; installation of 30% of the requisite underground electrical and telephone wiring; construction of 45% of the TV coaxial distribution system; completion of more than 30% of the landscaping; and completion of recreational facilities capable of servicing the entire 557 unit project.

units that lawfully could be built in Bensalem Village was reduced from 557 to 200.

Mark-Garner's appeal to the Zoning Hearing Board was eventually heard, but only after expensive and time-consuming delays. The Zoning Hearing Board denied the appeal, forcing the Petitioner to go to state court for equitable relief.[3] There was no possibility of obtaining money damages in the state court proceeding.

In February, 1977, a group of homeowners in Bensalem Village filed suit in the United States District Court for the Eastern District of Pennsylvania, seeking to compel completion of the project. Mark-Garner, named as a defendant, crossclaimed against the Township defendants (and joined the Zoning Hearing Board as an additional defendant), basing its Crossclaim on violations of the fifth and fourteenth amendments to the United States Constitution and on 42 U. S. C. §§ 1983, 1985(3), and 1986.

The constitutional violations by the Township defendants against Mark-Garner were set forth in Petitioner's Crossclaim with sufficient specificity to put all defendants on notice of the claims against them (the Crossclaim is included in the Appendix at A51 through A77). Mark-Garner alleged that the Board of Supervisors amended the zoning ordinance, and applied it to developers with final plan approval, with the express purpose and intent of putting such developers out of business.

In support of this contention the Crossclaim alleged that the Supervisors openly announced that they would

3. That lawsuit raised a legal question under the Pennsylvania Municipal Planning Code, 53 P. S. § 10508(4). Although Mark-Garner prevailed at the trial court level, the Pennsylvania Commonwealth Court recently reversed that decision in *In Re: Appeal by Mark-Garner Associates, Inc. From the Decision of Bensalem Township Zoning Hearing Board Sustaining Decision of Zoning Officer of Bensalem Township*, No. 1210 C. D. 1978 (April 8, 1980).

take any and all actions necessary to stop Bensalem Village and other, similar developments. They further announced, according to the Crossclaim, that they were not concerned with the legality of such conduct, and if challenged in court, they would engage in dilatory tactics to cause excessive delays and legal costs, thereby driving the developers out of business. In short, the Board of Supervisors declared open warfare on developers in the Township, irrespective of the legality of their acts.

Mark-Garner's Crossclaim alleged that the Supervisors conspired with the other Township defendants to accomplish their goal. The Supervisors obtained the Zoning Officer's cooperation, who rejected Petitioner's application for building permits on grounds never previously applied to Mark-Garner. They also obtained the cooperation of the Zoning Hearing Board, which delayed Mark-Garner's appeal for weeks, and which then ruled against Petitioner contrary to the advice of its own Solicitor.

The Township defendants successfully accomplished their intended result. Mark-Garner was barred from completing Bensalem Village as originally planned and approved. This conspiracy exposed Petitioner to suit by the existing homeowners, and eliminated any possibility that Mark-Garner could complete the project on a profitable basis. Ultimately, Mark-Garner was put out of business as a direct result of the illegal acts of the Township defendants.

Notwithstanding the allegations in Petitioner's Crossclaim, the district court dismissed it pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court held that neither the Complaint nor the Crossclaim was sufficiently specific to state a claim upon which relief could be granted. A39. However, the dis-

trict court did not analyze the Crossclaim separately from the Complaint to determine if it satisfied the standard of specificity applicable to civil rights actions. Mark-Garner took a timely appeal from the district court's decision.[4]

In analyzing the case, the Court of Appeals did not squarely confront the grounds upon which the district court had dismissed the case. Rather, it analyzed Petitioner's Crossclaim as if it were a traditional challenge to the zoning authority of a local governing body, thereby evading the central issue of the case.

Mark-Garner has never contended that the Board of Supervisors lacked the authority to enact the kind of zoning amendments involved here. What Petitioner does contend, and what it has never been given the opportunity to prove, is that the Township defendants intentionally set out to put Mark-Garner and other developers out of business. The announced purpose and intent of the zoning amendments inherently defeats their legitimacy. Therefore, this use of the zoning power was a clear denial of Mark-Garner's constitutional and statutory rights.

4. The plaintiff-homeowners did not appeal the decision of the district court, and took no part in the proceedings before the Third Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT.

Petitioner Mark-Garner respectfully asserts that its Petition presents four reasons to grant a writ to review the decision of the Court of Appeals for the Third Circuit.

First, the Court of Appeals purported to apply this Court's "rational relation" test to Petitioner's equal protection and due process challenges to a local zoning ordinance. However, the Circuit Court *assumed* satisfaction of the first prong of that test, *i.e.*, assumed that there was a legitimate interest underlying the challenged statute. Petitioner's Crossclaim specifically alleged to the contrary.[5] Thus, the decision of the Court of Appeals directly conflicts with this Court's requirement of a two part rational relation standard of review.

Second, the decision of the Court of Appeals conflicts with this Court's holding in *Williams v. Illinois*, 399 U. S. 235 (1970). There the Court held that the application of a facially neutral statute disparately weighed on a particular class and denied that class the equal protection of the laws. The Court of Appeals did not address that issue, notwithstanding the detailed allegations in Petitioner's Crossclaim that the zoning ordinance was intentionally enacted and implemented to put a specific class of developers out of business.

Third, the Court of Appeals abandoned the requisite judicial procedure by exchanging the specific allegations of Petitioner's Crossclaim for its own factual assumptions. The trial court had dismissed the Crossclaim for lack of specificity. The Third Circuit did not view the allegations

5. Mark-Garner alleged that the Supervisors openly stated that they intended to stop this and all other developments by whatever means possible, regardless of the legality of their actions. They further announced that they would use dilatory tactics to cause delay and excessive legal costs, to discourage sales, and ultimately to put Petitioner and other developers out of business. Crossclaim, A66-A68.

of the Crossclaim in the light most favorable to Petitioner, as required by *Scheuer v. Rhodes,* 416 U. S. 232 (1974), but instead, created its own underlying purpose for the zoning amendments. Despite the fact that the underlying facts were still in dispute, the Circuit Court erroneously concluded that Petitioner's Crossclaim could not prevail.

Fourth and finally, the Court of Appeals ignored this Court's instructions for the review of an alleged unconstitutional taking of private property. The Circuit Court refused to permit Petitioner to develop and present facts supporting its claim, although *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393 (1922), and *Penn Central Transportation Co. v. New York City,* 438 U. S. 104 (1978), require a factual analysis of a taking claim. Furthermore, the Court of Appeals again presumed a legitimate state interest contrary to Petitioner's allegations, thus overlooking the seminal inquiry required by *Village of Euclid v. Ambler Realty Co.,* 272 U. S. 365 (1926), and *Pennsylvania Coal Co., supra.*

Each of these considerations is sufficient for the granting of a writ to review the decision of the court below.

I. The Court of Appeals Misapplied the Rational Relation Test When It Formulated a Legitimate Purpose for the Township Zoning Amendments in Direct Conflict With Petitioner's Allegations of an Invidious and Illegitimate Purpose.

The Court of Appeals held that the "rational relation" standard was applicable to all of Mark-Garner's claims.[6] Petitioner does not dispute the appropriateness of that test

6. The Court of Appeals held that Mark-Garner's allegations under 42 U. S. C. § 1983 subsumed all the independent, constitutional causes of action. A11. It further held that its analysis of Mark-Garner's constitutional claims, as applied to the § 1983 cause of action, would be identical for the causes of action under 42 U. S. C. §§ 1985(3) and 1986, and therefore separate analysis was unnecessary. A31-A32.

here. However, in its application the Court of Appeals has so twisted the standard that it has taken on a new and disastrous meaning. Under the Court of Appeals formulation the "rational relation" test has become an irrebutable presumption of validity standard. Such an analysis bears no relationship to the guidelines established by this Court, and must not be permitted to stand.

A. The Rational Relation Standard for Constitutional Claims Was Clearly Articulated in *Vance v. Bradley.*

When confronted with alleged constitutional violations affecting business or other economic activity, this Court has consistently applied a two-pronged rational relation standard to test the validity of the allegation.[7] *First,* the foundation of the test is whether or not there is a legitimate purpose behind the governmental action. *Second,* only if there is a legitimate purpose to the legislation does the court question whether the state action is "rationally related to furthering [this] legitimate state interest." *Vance v. Bradley,* 440 U. S. 93, 97 (1979), citing *Massachusetts Board of Retirement v. Murgia,* 427 U. S. 307, 312 (1976).[8]

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7. The Court of Appeals held that Petitioner's equal protection and substantive due process claims both hinged on a rational relation test. A12, A16-A17. Its incorrect application of that test was equally erroneous for both these claims.

8. *Vance v. Bradley, supra,* was an equal protection case. However, this Court has made it clear that the rational relation standard is fundamentally the same in the due process context. *Williamson v. Lee Optical Co.,* 348 U. S. 483, 488 (1955).

The Court of Appeals quite properly noted that in applying the rational relation test to a due process claim,

> "the focus . . . is not whether the Township has irrationally distinguished between similarly situated classes [the equal protection analysis], but whether it was rational for the Township to have passed the law at all and to have applied it to Mark-Garner." A17.

The rational relation standard recognizes judicial deference to the legislative and democratic processes. It is not intended as a complete abdication of the judiciary's role in reviewing the complex interrelationship between society's public and private sectors. It is precisely this role which the Court of Appeals refused to perform in its analysis of Petitioner's Crossclaim.

B. The Court of Appeals Erroneously Found That the First Prong of the Rational Relation Standard Had Been Satisfied, in Direct Opposition to the Allegations in Petitioner's Crossclaim.

The Court of Appeals erred by failing to consider whether the first prong of the rational relation test had been satisfied. The Court of Appeals assumed that since a local governmental body theoretically *could* have a valid purpose for passing zoning legislation, the actions of Bensalem Township's Board of Supervisors *must*, therefore, have been valid. This assumption directly contradicted Petitioner's allegations of an invidious purpose.

Mark-Garner has never been given the opportunity to prove the merits of its Crossclaim, since the trial court dismissed the case for failure to state a claim. Given this posture, the Court of Appeals was obligated to consider Petitioner's allegations, and to construe those allegations in the light most favorable to Mark-Garner. *Scheuer v. Rhodes*, 416 U. S. 232, 236 (1974).

If the Circuit Court had applied this principle, it would have found that Petitioner specifically alleged an *illegitimate* purpose for the passage of the zoning amendments. Petitioner's Crossclaim contended that members of the Board had expressly stated that they were willing to go to whatever lengths necessary to insure the stoppage of projects like Bensalem Village.

In light of *Scheuer v. Rhodes, supra,* the Court of Appeals was not free to speculate on possible legitimate purposes for the Supervisors' actions. The Court of Appeals cannot substitute its own perception of a valid state interest for the purpose expressed by the legislative body.

This Court has held that the rational relation test is not a judicial rubber stamping device to legitimate all governmental action. See *Eisenstadt v. Baird,* 405 U. S. 438, 447 (1972). Petitioner respectfully submits that the Court of Appeals erroneously found that the first prong of the rational relation test had been satisfied by substituting its own assumptions for Petitioner's allegations. The effect of that action is to eliminate the very foundation of the rational relation test.

C. The Effect of the Court of Appeals Opinion Is to Eliminate All Challenges to Governmental Authority Over Land Use Regulation by Installing the Courts as a Super Legislature.

The Circuit Court's substitution of its assumption of a legitimate purpose for the zoning amendments insulates from review all governmental action for which a court is able to conceive a proper purpose. Such a procedure has no legal basis. In effect, it substitutes a court's judgment for that of the legislature, a role this Court has unequivocally rejected. *Williamson v. Lee Optical Co., supra,* 348 U. S. at 488.

The Court of Appeals should not have gone beyond the facts in Petitioner's Crossclaim in considering the first prong of the rational relation test. If the Court of Appeals is permitted to assume that legislation is based on a legitimate purpose, ignoring allegations to the contrary, then there is no meaning to the rational relation test. Under this new irrebutable presumption standard, all legislation *qua* legislation is valid.

This Court cannot allow the rational relation test to be emasculated. There must be a meaningful vehicle for challenging the invalid use of democratic processes for invidious purposes. Petitioner requests that this Court grant certiorari to review the Circuit Court's decision on this issue.

II. The Court of Appeals Did Not Address Mark-Garner's Claim That the Zoning Amendments Were Used to Discriminate Against a Particular Class of Developers.

Vance v. Bradley, supra, and the rational relation test it articulated, is not controlling on Petitioner's alternative equal protection argument. Petitioner does not question the right of Bensalem Township to pass zoning ordinances and amendments, once a legitimate purpose for the legislation has been established. While we believe the Court of Appeals misapplied the *Vance* test by assuming a legitimate purpose, it did not deal at all with the argument that the zoning amendments as applied fell most harshly on a particular class of developers.

Petitioner contends that the Board of Supervisors implemented the amended zoning ordinance to prohibit the class of developers with final plan approval from completing their projects. The zoning law and procedure became an economic club to drive this class of developers out of the Township. It is a violation of the equal protection clause to use an otherwise valid piece of legislation for an illegal and discriminatory purpose. *Williams v. Illinois,* 399 U. S. 235 (1970).

In *Williams* this Court held that the invidious application of an otherwise valid statutory sentence violated Mr. Williams' equal protection rights. The focal point for *Williams* was the "illustory choice" presented to the appellant. While the statutory sanction appeared to extend equally to all defendants, in reality it fell most harshly on

indigent defendants who could not satisfy the financial requirements of the sentence.[9] *Id.* at 242. This Court held that the effect of the statute was to isolate a particular category or class of persons and to visit on them a penalty not inflicted on others. *Id.* at 242.

Bensalem Township's Board of Supervisors presented Petitioner with a comparable "illusory choice". On the surface, the Bensalem zoning amendments applied equally to all developers in R-4 districts, just as the statutory penalty in *Williams* appeared to be neutral. However, Petitioner's "choice", to continue the condominium project as rezoned, was indeed illusory, as there was no economically feasible way for Petitioner to continue. The original and all subsequent investments in the project had relied upon the approved 557 unit plan. Furthermore, 106 dwellings had been sold to purchasers relying on a 557 unit project. Mark-Garner could not develop Bensalem Village unless it did so pursuant to the original plan approved by the Township.

Petitioner's Crossclaim alleged precisely the kind of invidious discrimination against a class which *Williams v. Illinois* prohibited. Furthermore, Petitioner alleged that unlike the situation in *Williams,* the Township defendants intentionally wielded the zoning ordinances to accomplish this discriminatory end. Mark-Garner has a right to attempt to prove these contentions. The Court of Appeals erred in denying Petitioner this opportunity.

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9. *Williams* involved an indigent defendant who was unable to pay a statutorily imposed fine and court costs. Under the statute, the appellant was imprisoned 101 days longer than the maximum permissible sentence under the law, the additional time having been imposed to "work off" the fine and costs.

III. The Court of Appeals Failed to Implement the Correct Standard for the Sufficiency of Pleadings and Incorrectly Substituted Its Own Conclusions for the Well-Pleaded Allegations in Petitioner's Crossclaim.

A. Pleadings Must Be Construed in the Light Most Favorable to the Pleader When They Are Reviewed Pursuant to a Motion to Dismiss.

This Court has assigned a limited role to the courts in reviewing the sufficiency of pleadings before them. *Scheuer v. Rhodes,* 416 U. S. 232, 236 (1974). The test outlined by Chief Justice Burger's unanimous opinion in *Scheuer* established that the burden of pleading is not a strenuous one:

> The *issue is not whether a plaintiff will ultimately prevail,* but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely *but that is not the test.* Moreover, it is well established that, in passing on a motion to dismiss . . . for failure to state a cause of action, the allegations of the Complaint should be construed favorably to the pleader.

Id. at 236 (emphasis added).

Contrary to the *Scheuer* language, the Court of Appeals found that because the petitioner "*could not prevail* on any of its § 1983 allegations," A12 (emphasis added), a dismissal of Petitioner's Crossclaim was warranted. Given the allegations in the Crossclaim, Mark-Garner was at least entitled to an opportunity to present its case. The Court of Appeals erred in substituting its own perceptions for those in the Crossclaim, and concluding from those that Mark-Garner could not recover.

B. The Court of Appeals Failed to Implement the Correct Standard of Specificity to Which It Had Previously Adhered in *Helstoski v. Goldstein.*

The Court of Appeals also failed to follow its own precedent for the requisite sufficiency of Petitioner's pleadings. In *Helstoski v. Goldstein,* 552 F. 2d 564 (1977) (per curiam), the Court of Appeals held:

> The district court dismissed Mr. Helstoski's complaint before any discovery was had and before any evidence was received.
>
> Under such circumstances, we must take all of the well-pleaded allegations of the complaint as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any circumstances, the plaintiff might be entitled to any relief.

Id. at 565 citing *Scheuer v. Rhodes, supra.*

The *Helstoski* Court outlined two important considerations. *Id.* at 565-6. The first centered on the lack of opportunity afforded the plaintiff to present any evidence prior to the district court's dismissal of his claim. The second was that the district court had interpreted the applicable precedent in direct contravention to plaintiff's averments. Therefore, the Court of Appeals remanded the case for further proceedings.

Petitioner's case was in the same posture as *Helstoski* when it went to the Court of Appeals. Here, however, the Court of Appeals did not address the procedural stance of Petitioner's claim, but instead, discussed the case as if Petitioner had been given the full opportunity to present its claims.

More importantly, the Court of Appeals could not have construed the Crossclaim under the *Helstoski* stand-

ard and reached the conclusion it did. Petitioner alleged that the zoning ordinances were enacted and implemented for the sole purpose of putting Mark-Garner and other developers out of business. This is not a "legitimate state interest" under the rational relation test outlined above. Therefore, construing the pleadings in the light most favorable to the pleader, the constitutional claims should not have been summarily dismissed.

IV. The Court of Appeals Decision That the Township's Actions Did Not Constitute a Taking Under the Fifth Amendment Was in Direct Opposition to Supreme Court Precedents.

There is no question that the Board of Supervisors of Bensalem Township had the authority to enact a proper zoning ordinance. The propriety of that ordinance, however, is strictly limited by the legal principles established by this Court. The Court of Appeals ignored or misapplied those principles with respect to the "taking" issue under the fifth amendment.

A. The Valid Exercise of Local Zoning Power Presupposes a Legitimate State Purpose for the Zoning Laws and a Limitation on Their Scope. There Was No Such Purpose or Limitation in This Case.

Over 50 years ago this Court established that a zoning ordinance is constitutionally permissible when the public interest requires limitations on the use of private property. *Village of Euclid v. Ambler Realty Company*, 272 U. S. 365 (1926).[10] In order to declare a zoning ordinance unconstitutional, it must appear that the provision is

10. This principle was recently affirmed in *PruneYard Shopping Center v. Robins*, — U. S. —, 48 U. S. L. W. 4650 (June 9, 1980).

plainly arbitrary and unreasonable, and has no substantial relation to the public health, safety, morals or general welfare. *Id.* at 395.[11] *Agins v. City of Tiburon*, — U. S. —, 48 U. S. L. W. 4700, 4701 (June 10, 1980).[12]

This Court has permitted the government to diminish substantially the value of a private citizen's property when the contested statute is founded on a legitimate state interest. *E.g., Miller v. Schoene*, 276 U. S. 272 (1928); *Goldblatt v. Hempstead*, 369 U. S. 590 (1962).

The Court of Appeals did not analyze Petitioner's case in light of the principles established by this Court. Here, Petitioner expressly alleged that the purpose behind the alteration of the zoning ordinance was *not* for the "health, safety or welfare" of the Township's population. *Penn Central Transportation Co. v. New York City*, 438 U. S. 104, 125 (1978). Rather, Petitioner alleged that the Board of Supervisors campaigned on the promise to halt all development, whether by legal means or otherwise. The zoning amendments were intended to accomplish that goal. Therefore, the purpose behind the zoning was expressly not a legitimate one, and the amendments could not have been a proper exercise of the police power.

Furthermore, an otherwise proper regulation may become so intrusive as to constitute a taking. As Justice Holmes stated in *Pennsylvania Coal v. Mahon*, 260 U. S. 393 (1922):

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation . . . [T]he

11. *See, e.g., City of Ann Arbor, Michigan v. Northwest Park Construction Corp.*, 280 F. 2d 212 (6th Cir. 1960).

12. There was no challenge in *Agins v. City of Tiburon, supra,* to the legitimacy of the purpose underlying the challenged statute. *Id.* at 4701 and n. 8.

> general rule at least is, that while property may be regulated to a certain extent, *if a regulation goes too far it will be recognized as a taking* . . . [A]s we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions.

260 U. S. at 415-16 (emphasis added).[13]

The decisions above establish a firm directive for the lower courts: governmental regulations which heavily encumber private property interests should be carefully scrutinized and reviewed. The Court of Appeals ignored this directive by failing to consider either the legitimacy of the underlying purpose or the intrusiveness of the regulation.

B. The Court of Appeals Did Not Follow This Court's Mandate in *Penn Central Transportation Co. v. New York City* That Contentions of an Unjustifiable Taking Require a Case by Case Factual Analysis.

In *Penn Central Transportation Co. v. New York City*, 438 U. S. 104 (1978), this Court considered whether a zoning ordinance resulted in a temporary taking of property without just compensation. 438 U. S. at 107, 119. The opinion set out the proper judicial approach to these "problem[s] of considerable difficulty". *Id.* at 123.

> . . . this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated

13. The Court reaffirmed this principle in *Kaiser Aetna v. United States*, 444 U. S. 164 (1979).

> by the government, rather than remain disproportionately concentrated on a few persons . . . . *Id.* at 124.

This Court found the essence of its decisions were "essentially ad hoc, factual inquiries." *Id.* at 124.[14]

The *Penn Central* approach mirrored Justice Holmes' analysis in *Pennsylvania Coal*:

> When [the diminution in value] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. *So the question depends on the particular facts.* . . . 260 U. S. at 413 (emphasis added).[15]

Despite the resounding solidarity of this Court's holdings, the Court of Appeals affirmed the dismissal of Mark-Garner's Crossclaim without permitting a hearing on the merits. Surely, when this Court stated that a "taking" decision is a "problem of considerable difficulty", *Penn Central, supra,* at 123, it did not envision that a court would dispose of the issue without permitting some reasonable presentation of the merits of plaintiff's claims.

Therefore, the Court of Appeals erred in deciding that Bensalem Township's ordinance was a valid exercise of state regulation of private property. The Third Circuit was not free to make this decision without having a full record before it.

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14. *Accord, Goldblatt v. Hempstead, supra; U. S. v. Central Eureka Mining Company,* 357 U. S. 155, 168 (1958). *See U. S. v. Caltex, Inc.,* 344 U. S. 149, 156 (1952).

15. *See also Berman v. Parker,* 348 U. S. 26, 32 (1954), (The definition of the police power depends on the specific facts of each case); *Goldblatt v. Town of Hempstead, supra,* at 594, ("There is no set formula to determine where regulation ends and taking begins").

C. The Line Between Valid Regulation and Uncompensated Taking Was Crossed by the Township's Actions in This Case.

The zoning ordinance's interference with the Petitioner's property parallels the taking that this Court found in *Pennsylvania Coal, supra.* There, Justice Holmes found a statute unconstitutional which made it commercially impracticable to remove valuable coal deposits left unmined. *Id.* at 413. Justice Holmes held that:

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. *Id.* at 416.

Petitioner has suffered a similar taking under the Bensalem zoning amendments. The zoning amendments made it commercially impracticable for the Petitioner to complete his construction, since his entire investment and legal commitment to the initial 106 homeowners were both based on a 557 unit development. Indeed, Mark-Garner was put out of business after thirty years of successful operation as a direct result of the confiscatory taking of Bensalem Village.

Petitioner respectfully submits that the Constitution requires that the Township defendants compensate the Petitioner for the damage incurred as a result of this taking.

V. Conclusion.

The Court of Appeals totally misapplied or failed to consider this Court's guidelines on the permissible regulation of private property by government. The "taking" question was decided without benefit of any presentation

of the facts, yet it is clearly a factual inquiry. The "rational relation" test, as applied to both equal protection and due process claims, was grievously perverted by the Third Circuit's analysis. If permitted to stand, the precedent will effectively eliminate judicial review of legislation which impinges on business or economic activity. This Court must not permit such a result.

Respectfully submitted,

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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1361

SHARON L. ROGIN and MICHAEL R. ROGIN, ANN MANGANO and WM. MANGANO, JANET CASELLI and CHRISTOPHER CASELLI, BARBARA UEBERROTH and A. JAMES UEBERROTH, and MAUREEN BLASIC and JOSEPH BLASIC, individually and on behalf of others similarly situated

v.

BENSALEM TOWNSHIP and STEPHEN J. KELLY, THEODORE R. ZAJAC, WILLIAM McFADDEN, HERBERT BRADEN, and DONALD BELL, individually and in their official capacities as the BOARD OF SUPERVISORS OF BENSALEM TOWNSHIP and STANLEY HOROWITZ, individually and in his capacity as ZONING OFFICER OF BENSALEM TOWNSHIP and MARK-GARNER ASSOCIATES, INC., of Pennsylvania

MARK-GARNER ASSOCIATES, INC., of Pennsylvania,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(C. A. No. 77-0557)

Argued October 9, 1979
Before: ADAMS, ROSENN and WEIS, *Circuit Judges*
(Filed February 21, 1980)

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Bensalem Township Zoning Hearing Board

OPINION OF THE COURT

ADAMS, *Circuit Judge*

A real estate developer has cast an array of federal constitutional and statutory challenges to the application of a local zoning ordinance to a condominium project it was in the process of constructing. On this appeal from the dismissal on the pleadings of the developer's cross-claims, we are guided by well-settled principles in affirming the judgment of the district court.

I. FACTUAL BACKGROUND

In late 1972, Mark-Garner Associates, Inc., a real estate developer and the cross-claimant in this case, purchased approximately fifty acres of land in Bensalem

Township, Bucks County, Pennsylvania, and drew up plans to build a 557-unit condominium project to be known as "Bensalem Village." On May 16, 1973, the Board of Supervisors of Bensalem Township granted final approval of the plans. In accordance with Pennsylvania law, Mark-Garner then filed a "Condominium Declaration" and a statement of "Rules and Regulations for Bensalem Village."[1] In reliance on the Supervisors' final approval of the Bensalem Village plans, construction of the Village community commenced in the spring of 1973, and continued until September 1976. By the latter date, 106 of the planned 557 condominium units had been approved and were under construction, and a major portion of the common area improvements had been completed.[2]

On September 24, 1976, Mark-Garner applied for twelve additional building permits. For the first time, its request was denied.[3] The Township Zoning Officer, Stanley Horowitz, informed the developer that the plan for Bensalem Village no longer complied with the township's zoning ordinance, which had been amended in June 1973, a little over a month after the Supervisors approved the original plan. The amendment reduced the allowable density in the R-4 District, the classification applicable to Bensalem Village, from twelve to ten units per acre. Mark-Garner appealed the zoning officer's de-

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1. 68 Pa. Cons. Stat. Ann. §700.401 (Purdon 1965). For a general description and appraisal of the statute, commonly known as the "Unit Property Act," see Rosenstein, *Inadequacies of Current Condominium Legislation — A Critical Look at the Pennsylvania Unit Property Act*, 47 Temple L.Q. 655 (1974).

2. The improvements included completion of the storm sewers, sanitary sewers, water lines, and service roads, as well as eighty percent of the underground electric feed lines and telephone trunk lines.

3. Despite the Supervisors' general approval of all 557 planned units, the developer apparently was required to apply periodically for the actual building permits as it became ready to build a cluster of units.

cision to the Zoning Hearing Board of Bensalem Township. On October 8, 1976, prior to the date of the hearing on the appeal, the Board of Supervisors again amended the ordinance to lower the permissible density in the R-4 District to four units per acre. As a result of the two amendments, the total number of units that lawfully could be built in Bensalem Village was reduced from 557 to 200.

After several hearings, the Zoning Hearing Board denied Mark-Garner's appeal. The developer appealed the Board's decision to the Court of Common Pleas of Bucks County, and also requested mandamus directing the Zoning Officer to issue the remaining permits. The Court reversed the Zoning Hearing Board's decision and ordered that all remaining permits be issued.[4] Because the project was "substantially undertaken," the Court concluded, Pennsylvania law prohibited the retroactive application of the zoning amendments to Bensalem Village.[5] The Court's mandate was stayed pending the ap-

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4. *In re* Appeal by Mark-Garner Assocs., Inc., No. 77-0718-09-5 (Ct. Comm. Pl. filed May 18, 1978), *reprinted in* App. 225.

5. Section 508(4) of the Pennsylvania Municipalities Code, 53 Pa. Cons. Stat. Ann. §10508(4) (Purdon 1972), provides in relevant part:

> When an application for approval of a plat, whether preliminary or final, has been approved or approved subject to conditions acceptable to the applicant, no subsequent change or amendment in the zoning, subdivision or other governing ordinance or plan shall be applied to affect adversely the right of the applicant to commence and to complete any aspect of the approved development in accordance with the terms of such approval within three years from such approval. Where final approval is preceded by preliminary approval, the three-year period shall be counted from the date of the preliminary approval.

The court held that if a development project is "substantially undertaken within the Section 508(4) three year period the protections of that Section are invoked and remain in effect until the project is completed." *In re* Appeal by Mark-Garner Assocs., *supra* note 4, at 1-7.

peal by the Zoning Hearing Board to the Commonwealth Court, which has not yet rendered its decision. As a consequence, the Zoning Officer has issued no permits to Mark-Garner since September 1976.

The present class action was filed during the pendency of Mark-Garner's appeal to the Court of Common Pleas by a group of homeowners who had purchased lots in Bensalem Village. The complaint requested injunctive relief directing the Zoning Officer to issue the remaining permits as well as money damages resulting from the delay in construction. Mark-Garner, which was named as a defendant, cross-claimed for damages, declaratory judgment, and injunctive relief against the Township, the members of the Board of Supervisors, the Zoning Hearing Board, and the Zoning Officer. The individual cross-defendants were named in both their official and personal capacities. Mark-Garner alleged that the cross-defendants, acting under color of state law, conspired to adopt and implement a policy of delay and cost escalation for the purpose of discouraging construction of Bensalem Village. The developer claimed that the value of its property was thereby diminished or destroyed, and that it was denied substantive due process, procedural due process, equal protection of the laws, and its rights under state and local statutes. Federal subject matter jurisdiction was premised both on civil rights statutes, 42 U.S.C. §§1983, 1985(3) and 1986 (1976), and on a purported direct cause of action under the Fourteenth Amendment.[6]

Following a motion by the cross-defendants, the district court dismissed Mark-Garner's cross-claim for failure to state a claim on which relief could be granted.[7]

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6. Mark-Garner alleged that the district court had jurisdiction over the federal claims pursuant to 28 U.S.C. §§1331, 1343, 2201 and 2202 (1976), and had pendent jurisdiction over the state claims.

7. Fed. R. Civ. P. 12(b)(6).

and because the Court of Common Pleas' decision rendered the case moot.[8] Mark-Garner filed a timely appeal. We hold that the case is not moot, but affirm the district court's decision that the cross-claim does not state a cause of action.

II. MOOTNESS

It was suggested by the district court that Mark-Garner's claims were moot because it had received injunctive relief in the Court of Common Pleas. Inasmuch as mootness would divest us of jurisdiction to consider this appeal,[9] we are obligated to address this issue as a threshold matter.

The present dispute is unlike the traditional line of mootness cases in which changes extraneous to the judicial process terminate the legal controversy.[10] The district court apparently has held that Mark-Garner's federal civil rights claims are moot because similar claims based on state law were adjudicated in favor of the developer in a state tribunal. Such a ruling, we believe, incorrectly interprets the law of mootness.[11]

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8. The district court also dismissed the homeowners' claim under Rule 12(b)(6). However, the homeowners have not appealed.

9. DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (per curiam); North Carolina v. Rice, 404 U.S. 244, 246 (1971) (per curiam).

10. *E.g.*, County of Los Angeles v. Davis, 440 U.S. 625 (1979) (case moot because county fire department had not employed the allegedly discriminatory test for ten years and had fully remedied effects of prior discriminatory use); DeFunis v. Odegaard, 416 U.S. 312 (1974) (case moot because law school applicant challenging racially preferential admissions policy had been admitted and defendant school acknowledged that, regardless of Court's decision, applicant would continue to be enrolled); Hall v. Beals, 396 U.S. 45 (1969) (per curiam) (case moot because length of challenged voter residency requirement was shortened by state legislature such that plaintiffs could have voted in last and all future elections).

11. In fact, there may not be a mootness question in this case at all. Rather, the actual effect of the Court of Common Pleas' deci-

"[A] case is moot," the Supreme Court has held, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."[12] The Court has developed a two-pronged test for mootness. A case may become moot if (1) "it can be said with assurance that 'there is no reasonable expectation . . . ' that the alleged violation will recur," and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."[13]

In the occurrent case, neither prong is satisfied. The Court of Common Pleas' judgment determined only Mark-Garner's state law claim for injunctive relief; it was not presented, however, with any federal civil rights claims or with any claim for damages. Thus, the state court's relief cannot be said to have "completely eradicated" the effects of the alleged violation. Nor can it be said that there has been an "irrevocable eradication" even of the state law violations, for the Court of Common Pleas' decision has been appealed, and thus could be reversed by a higher Pennsylvania court. Finally, inasmuch as the Court of Common Pleas decided only questions of state law, there is no assurance that the federal constitutional violations alleged in the cross-claim will not recur. In short, there are present here "live" federal constitutional issues that have not been adjudicated

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sion might be to preclude Mark-Gardner from suing in federal court, at least as to the state claims, under the doctrine of res judicata. Res judicata is an affirmative defense, Fed. R. Civ. P. 8(c), not a question of jurisdiction. Scholla v. Scholla, 201 F.2d 211, 213 (D.C. Cir.), *cert. denied*, 345 U.S. 966 (1953). Because the defendants did not raise the defense in their pleadings, we do not address the issue. *See* First Nat'l State Bank of New Jersey v. Commonwealth Federal Sav. and Loan Ass'n of Norristown, No. 75-1712, slip op. at 10 (3d Cir. filed Dec. 3, 1979); Sartin v. Comm'r of Pub. Safety, 535 F.2d 430, 433 (8th Cir. 1976).

12. Powell v. McCormack, 395 U.S. 486, 496 (1969), *quoted in* County of Los Angeles v. Davis, 440 U.S. at 631.

13. County of Los Angeles v. Davis, 440 U.S. at 631.

in any other court. And in view of the large amount of unsettled damages, both parties have a legal interest in the outcome. Accordingly, we hold that the case is not moot and proceed to the substantive questions pressed by Mark-Garner regarding the dismissal of the cross-claim.

III. SUBSTANTIVE CLAIMS

In reviewing the dismissal on the pleadings for failure to state a claim, we must take all of the well-pleaded allegations of the cross-claim as true, construe the cross-claim in the light most favorable to Mark-Garner, and determine whether, under any reasonable reading of the pleadings, the developer might be entitled to relief.[14]

A. Direct Claims for Damages under the Fourteenth Amendment

Mark-Garner brought several of its claims directly under the Fourteenth Amendment. These claims — alleging abridgements of due process and equal protection — are premised on the assumption that there exists an implied cause of action for damages under the Four-

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14. Helstoski v. Goldstein, 552 F.2d 564, 565 (3d Cir. 1977) (per curiam). In Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), a civil rights action, Mr. Chief Justice Burger wrote for a unanimous Court:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

teenth Amendment that is wholly independent of statutory authorization. The Supreme Court has not yet decided whether such a cause of action exists.[15] It has held, however, that there is an implied cause of action for damages under the Fourth[16] and Fifth[17] Amendments. We have declared that such an action exists for suits brought under the First Amendment,[18] but have reserved the question whether such a cause of action exists under the Fourteenth Amendment.[19] Other courts of appeals have held explicitly that there is an implied cause of action for damages under a number of constitutional provisions.[20]

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15. In Mt. Healthy School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977), the Court stated: "The question of whether . . . we should by analogy to our decision in *Bivens* . . . imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in §1983, is one which has never been decided by this court. We agree with respondent" that "it is an extremely important question and one which should not be decided on this record." *See* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 398-400 (1979); Aldinger v. Howard, 427 U.S. 1, 4 n.3 (1976); City of Kenosha v. Bruno, 412 U.S. 507, 511-14 (1973). *See also* Monell v. Dept. of Soc. Servs., 436 U.S. 658, 712-13 (1978) (Powell, J., concurring).

16. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 402 U.S. 388 (1971).

17. Davis v. Passman, 99 S. Ct. 2264 (1979).

18. Paton v. LaPrade, 524 F.2d 862, 869-70 (3d Cir. 1975).

19. Gagliardi v. Flint, 564 F.2d 112, 115-16 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978). *Cf. id.* at 117-26 (Gibbons, J., concurring) (arguing that this Court had previously decided that direct cause of action under Fourteenth Amendment exists — citing Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3d Cir. 1976) (per curiam); McCullough v. Redevelopment Auth. of Wilkes-Barre, 522 F.2d 858, 864 (3d Cir. 1975); Alderman v. Philadelphia Hous. Auth., 496 F.2d 164 (3d Cir.), *cert. denied*, 419 U.S. 844 (1974)).

20. For an exhaustive listing, see Davis v. Passman, 571 F.2d 793, 807 n.6 (5th Cir. 1978) (en banc) (Goldberg, J., dissenting), *rev'd*, 99 S.Ct. 2264 (1979). *See also* Lehmann, Bivens *and its Progeny*, 4 Hastings Const. L. Q. 531, 566-68 and nn.226-29 (1977) (collecting district court decisions).

There is no occasion to decide, in the present case, whether the Fourteenth Amendment authorizes a direct cause of action for damages,[21] however, because Mark-Garner has alleged causes of action under §1983 that are identical to its constitutional claims. Indeed, §1983 was designed to afford plaintiffs a cause of action for constitutional violations on the part of local governmental bodies and other state officials.[22]

In *Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978), two black citizens brought suit against the City of Pittsburgh as well as two of its police officers, alleging that the officers abused them on account of their race. The plaintiffs sought damages under 42 U.S.C. §§1981, 1983, and 1985 and under the Fourteenth Amendment. The district court dismissed the claims against the city on the basis of *Monroe v. Pape*, 365 U.S. 167 (1961), in which the Supreme Court had held that municipalities were immune from suit under §1983.[23] We affirmed the dismissal of the claims based on the Fourteenth Amendment and §§1983 and 1985, but reversed the dismissal of the claim based on §1981. "In view of our holding in this case that plaintiffs have stated a cause of action against the city under 42 U.S.C. §1981," we concluded, "a fourteenth amendment remedy should not be implied. . . . If plaintiffs prove the racially motivated deprivations of

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21. The opposing sides of the question whether a direct cause of action under the Fourteenth Amendment exists are set forth in Gagliardi v. Flint, 564 F.2d 112, 117-26 (3d Cir. 1977) (Gibbons, J., concurring) (there is such a cause of action) *cert. denied*, 438 U.S. 904 (1978), and in Mahone v. Waddle, 564 F.2d 1018, 1052-61 (3d Cir. 1977), (Garth, J., dissenting in part and concurring in part) (there is no such cause of action), *cert. denied*, 438 U.S. 904 (1978).

22. *See* Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978).

23. The Supreme Court subsequently overruled *Monroe* in Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978), on the ground that, in the earlier decision, it had misread the legislative history of §1983.

their rights which they allege, section 1981 will afford them the redress in federal court which they seek. *Bivens* teaches that the existence of an effective and substantial federal statutory remedy for the plaintiffs obviates the need to imply a constitutional remedy on [their] behalf."[24]

The principle enunciated in *Mahone* applies to the present action. Section 1983 affords Mark-Garner remedies at law or equity against the named defendants for any constitutional violations that can be established.[25] It is now settled that cities and other municipal bodies, such as the Bensalem Zoning Hearing Board, are "persons" within the meaning of §1983.[26] Therefore, it would be a redundant and wasteful use of judicial resources to permit the adjudication of both direct constitutional and §1983 claims when the latter wholly subsume the former.[27]

B. Section 1983 Claims

The developer alleges that the defendants deprived it of four constitutional rights for which §1983 author-

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24. 564 F.2d at 1024-25 (referring to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 407-11 (1971) (Harlan, J., concurring)).

25. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

26. Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978). See note 23 *supra* and accompanying text.

27. We express no opinion on the issue whether a direct cause of action under the Fourteenth Amendment would be available in the absence of an effective federal statutory remedy. See notes 15 and 21 *supra*.

izes remedial causes of action.[28] Specifically, it claims a denial of equal protection, a deprivation of substantive due process, that its property was taken without just compensation, and that it was deprived of procedural due process. Inasmuch as a reading of well-settled case law convinces us that Mark-Garner could not prevail on any of its §1983 allegations, we hold that the district court did not err in dismissing them.

1. Equal Protection

Mark-Garner charges that the cross-defendants denied it the equal protection of the laws because they passed zoning amendments for the purpose of discriminating against developers that had previously obtained construction approval for plans of greater density than that authorized by the amendments. Essentially, the charge is that the amendments unconstitutionally classified developers into two groups — those that had obtained construction approval at the time of the passage of the amendments and those that had not.

The allegations in the cross-claim suggest no basis for applying any equal protection standard except the rational relationship test.[29] In applying this test to legisla-

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28. *See* Lynch v. Household Finance Corp., 405 U.S. 538 (1972) (§1983 and its jurisdictional counterpart, 28 U.S.C. §1343(3), apply to property as well as personal rights). For a thoughtful criticism of this expansion of §1983, see H. Friendly, Federal Jurisdiction: A General View 90-92 (1973).

29. The Supreme Court will review certain equal protection challenges under more stringent standards — strict and intermediate scrutiny. The former test — whether the challenged classification is necessary to the accomplishment of a compelling state interest — thus far has been reserved for discriminations based on race, national origin, alienage, and for classifications made on account of the exercise of a constitutional right by one of the two classes. The latter category — whether the discrimination substantially furthers the achievement of an important governmental objective — thus far has been applied only to classsifications based on gender or illegitimacy. For a collection of cases, see generally G. Gunther, Constitutional Law ch. 10 (1975 and Supp. 1979).

tion that affects business or other economic activity, the Supreme Court has accorded great deference to the legislative decision to establish the challenged classification. The Court's most recent statement of the rule was in *Vance v. Bradley*, 440 U.S. 93 (1979), a case involving a challenge to a federal law mandating that participants in the Foreign Service Retirement System retire at age sixty. The Court held that "we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."[30]

Such broad deference is extended to legislative judgments dealing with business and economic matters because of the recognition that the process of democratic political decisionmaking often entails the accommodation of competing interests, and thus necessarily produces laws that burden some groups and not others. In the absence of special justification for more searching judicial examination — such as an allegation that the legislative body has classified on the basis of a suspect characteristic — for a court to undo the fruits of this process would be "to condemn as unconstitutional the most characteristic product of a democratic (perhaps of any) political system."[31]

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30. 440 U.S. at 97. *See also* Dieffenbach v. Attorney General of Vermont, 604 F.2d 187, 195 (2d Cir. 1979) ("In an economic matter such as this, we owe an extraordinary deference to state objectives, almost the equivalent of a strong presumption of constitutionality. . . . ").

31. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. Rev. 1, 28. For a marshalling of various criticisms of the rational relationship test, see generally Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 Calif. L. Rev. 1049 (1979); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205 (1970); McCloskey, *Economic Due Process and the Supreme Court: Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34; Note, *Equal Protection: A Closer*

To prevail on its equal protection claim, Mark-Garner must persuade us that the passage and application to it of the zoning amendments "so lack rationality that they constitute a constitutionally impermissible denial of equal protection."[32] Construing its cross-claim in the light most favorable to the developer, we conclude that it cannot discharge this burden.

Although zoning laws "must find their justification in some aspect of the police power, asserted for the public welfare," it is well-settled that such measures are constitutional if they bear a "substantial relation to the public health, safety, morals, or general welfare." *Village of Euclid v. Ambler Realty Co.*, 288 U.S. 365, 387, 395 (1926). The concept of general welfare has been broadly construed: "The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Berman v. Parker*, 348 U.S. 26, 33 (1954).

Relying on these decisions, the Supreme Court, in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), upheld a zoning law that defined the term "family" so as to exclude the plaintiffs — a group of six unrelated college students who had rented a house in the Village. Identifying the legitimate governmental purpose, the Court observed:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v.*

NOTE 31 — *(Continued)*

Look at Closer Scrutiny, Mich. L. Rev. 771 (1978); Note, *Legislative Purpose, Rationality and Equal Protection*, 82 Yale L.J. 123 (1972). *But see* Linde, *Due Process of Lawmaking*, 55 Neb. L. Rev. 197 (1976); Posner, *supra*.

32. New Orleans v. Dukes, 427 U.S. 297, 305 (1976) (per curiam).

> *Parker* [348 U.S. 26 (1954)]. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.[33]

Under these standards of rationality and legitimacy Mark-Garner cannot succeed with its equal protection claim. The Supervisors legitimately could have concluded that it was in the best environmental and economic interests of Bensalem Township to limit the number of residents and to prevent overcrowding. Reduction of the allowable density level of the R-4 zoning previously obtained district is a rational and reasonable means to accomplish this goal.[34] That the zoning amendments burden developers who had previously obtained construction approval more than they burden developers that may, in the future, plan to build in an R-4 zone, does not, under an equal protection analysis, vitiate either the reasonableness or the legitimacy of the density restrictions. In passing the amendments, the Supervisors reasonably could have concluded that it was neces-

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33. 416 U.S. at 9.

34. In analyzing this legitimate purpose and rational relationship, we emphasize that we do so only for the purpose of adjudicating Mark-Garner's appeal of the dismissal of its §1983 equal protection claim; we express no opinion whether the amendments can or would withstand all constitutional challenges. For example, suit might be brought alleging that the amendments were unlawfully intended to exclude the poor or racial minorities. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). *See generally* Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L.J. 385 (1977); *Developments in the Law — Zoning*, 91 Harv. L. Rev. 1427, 1624-1708 (1978). Inasmuch as Mark-Garner has not alleged that the zoning amendments are unconstitutionally exclusionary, however, we do not address that question here. *See also* note 42 *infra*.

sary to limit growth immediately because the completion of Bensalem Village, as originally approved, would so add to both the population and density that the purposes of the amendments would be frustrated. Inasmuch as we must defer to that judgment unless we find it to be so unrelated to the achievement of the Township's objectives as to be irrational[35] — and we do not — we hold that the district court did not err in concluding that Mark-Garner did not state an equal protection claim under §1983.

2. *Substantive Due Process*

Zoning laws are most commonly challenged on the ground that they violate substantive due process. At one time, the Supreme Court was willing to question the fairness and wisdom of a particular state statute and, despite disclaimers to the contrary,[36] to substitute its judgment about social policy for that of the legislative body. If the statute, in the Court's opinion, did not further the public interest in safety, morals, or welfare, the law was held to exceed the authority of the legislature and therefore to abridge the liberty and property protections of the due process clause.[37] In more recent years, the Court has abjured this supervisory role, however, and now applies virtually the same standard of review under the due process clause as it does in equal protection cases involv-

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35. Vance v. Bradley, 440 U.S. at 97.

36. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 56-57 (1905) (invalidating state law regulating working hours of bakery employees) ("This is not a question of substituting the judgment of the court for that of the legislature.").

37. *See, e.g., id.* at 58 ("We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law . . . ."). For a collection of the cases tracing the rise and fall of the substantive due process doctrine, see W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law 506-48 (1974). *See generally* McCloskey; *supra* note 31.

ing economic classifications.[38] The test of substantive due process, as for equal protection, is whether the law is rationally related to a legitimate state interest. "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[39] Unlike equal protection, however, the focus of due process analysis is not whether the Township has irrationally distinguished between similarly situated classes, but whether it was irrational for the Township to have passed the law at all and to have applied it to Mark-Garner.[40]

As we observed in deciding whether Mark-Garner stated an equal protection cause of action,[41] the Township has a legitimate interest in controlling population growth and density and the zoning amendments are a rational and reasonable means to accomplish that purpose. Therefore, the zoning amendments were not arbitrary or irrational and the district court did not err in dismissing the §1983 substantive due process claim.[42]

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38. *See* part 1 *supra*.

39. Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955). *See* Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 82-84 (1978); Whalen v. Roe, 429 U.S. 589, 596-98 (1977); Ferguson v. Skrupa, 372 U.S. 726 (1963).

40. *See* Dieffenbach v. Attorney Gen. of Vermont, 604 F.2d 187, 195 (2d Cir. 1979); Note, *Equal Protection: A Closer Look at Closer Scrutiny*, 76 Mich. L. Rev. 771, 831-37 (1978).

41. *See* part 1 *supra*.

42. We emphasize again that today's holding is not a general affirmation of the constitutionality of the Bensalem zoning ordinance as amended. *See* note 34 *supra*. Mark-Garner's cross-claim alleged only a violation of the "generous" substantive due process standard. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 263 (1977). It did not claim that the law is unconstitutionally exclusionary and, indeed, probably could not do so inasmuch as it may not assert the rights of third-parties and did not join as cross-plaintiff a person who would allege, for example, that the law discriminated against him on the basis of race. *See id.* at 263-64.

3. Taking Without Just Compensation

Although a zoning ordinance or other law comports with the requirements of substantive due process, it nonetheless may violate the "taking" clause of the Fifth Amendment that is applicable to the states through the Fourteenth Amendment.[43] Thus, if an otherwise valid law severely diminishes the value or impairs the use of a parcel of land, the state or local government may be constitutionally obligated to compensate the owner.[44] Mark-Garner predicates the third of its §1983 claims on the ground that the defendants' actions unconstitutionally diminished the value of Bensalem Village and therefore constituted a taking of its property.

In this regard, the Supreme Court recently observed: "The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty" involving "essentially ad hoc, factual inquiries."[45] Two factors appear to be of more importance to the Court than others. First, if the law in question applies generally to a broad class of properties, the Court is likely to sustain it.[46] The Court has stated that zoning laws are the classic example of this kind of general, social welfare legislation.[47] Second, unless application of the law destroys or severely diminishes the value of the property, the Court will uphold the

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43. Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 235-41 (1897).

44. If a taking is found to have occurred, courts generally will give the government the option either of abandoning the intrusive activity (if it is possible to do so) or of paying compensation. *See, e.g.*, Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *cert. granted*, No. 79-602, 48 U.S.L.W. 3426 (U.S. Jan. 8, 1980); Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 594-96, 350 N.E.2d 381, 384-86, 385 N.Y.2d 5, 8-9 (1976).

45. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978).

46. *Id.* at 125.

47. *Id.*

application. This is true even if the legislation prohibits "a beneficial use to which individual parcels had previously been devoted and thus cause[s] substantial individualized harm."[48]

Two cases aptly illustrate the Court's approach to "taking" questions. *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), dealt with a challenge to a city ordinance that banned any excavations below the water table and which had the effect of preventing the claimant from continuing a sand and gravel business he had operated for thirty years. In upholding the application of the ordinance, the Court noted that, as a safety measure, the law was a valid exercise of the police power.[49] It then concluded that, although the ordinance deprived the property of its most beneficial use, it was not unconstitutional. So long as the lot retained value, and there was no indication to the contrary, the ordinance was valid.[50] More recently, in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the Court rejected a "taking" challenge to New York City's Landmarks Preservation Law. The City had declared Grand Central Terminal to be a landmark and invoked the statute to block construction of a high-rise office building on top of the Terminal. Application of the law was not a taking, the Court held, because the "restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities

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48. *Id.* at 126-27 (citing Miller v. Schoene, 276 U.S. 272 (1928) (upholding mandatory removal of diseased cedar trees without compensation for loss of land value); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding law prohibiting claimant from continuing otherwise lawful brickyard business on ground that legislature reasonably concluded that continuance was inconsistent with neighboring uses)).

49. 369 U.S. at 594-96.

50. *Id.* at 592-94.

further to enhance not only the Terminal site proper but also other properties."[51]

Applying the principles of these cases to the matter at hand, we conclude that the district court did not err in dismissing Mark-Garner's §1983 "taking" claim. We have already held that the zoning amendments are valid exercises of the police power, passed as a means to limit the number of persons who might move into the area and to prevent overcrowding.[52] The amendments apply generally to all land within the R-4 zone, not only to Bensalem Village. The burden of the restrictions, although perhaps affecting Mark-Garner more than other landowners, is distributed over a substantial portion of the citizenry. Moreover, the general reduction in population density very likely will benefit the developer to some extent by making the remaining units in Bensalem Village more desirable. The first element of the "taking" calculus therefore operates in favor of validity in this case. In *Penn Central*, the Supreme Court remarked:

> It is, of course, true that the Landmarks Law has a more severe impact on some landowners than on

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51. 438 U.S. at 138. The Court emphasized the importance of the fact that the law had not severely diminished the economic value of the Terminal:

> We emphasize that our holding today is on the present record, which in turn is based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion. The city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be "economically viable," appellants may obtain relief.

Id. at n.36. *Cf:* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (striking down application of statute forbidding coal mining that could cause subsidence of dwellings because the harm protected against was not public and law made coal mining commercially impracticable).

52. *See* parts 1 & 2 *supra*.

> others, but that in itself does not mean that the law effects a "taking." Legislation designed to promote the general welfare commonly burdens some more than others . . . [Z]oning laws often affect some property owners more severely than others but have not been held to be invalid on that account. For example, the property owner in *Euclid* who wished to use its property for industrial purposes was affected far more severely by the ordinance than its neighbors who wished to use their land for residences.
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> * * * Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole — which we are unwilling to do — we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. Doubtless appellants believe they are more burdened than benefited by the law, but that must have been true, too, of the property owners in *Miller*, *Hadacheck*, *Euclid*, and *Goldblatt*.[53]

The second element of the "taking" formula also supports a conclusion in favor of validity. When as a result of governmental actions the diminution in the value of land reaches a "certain magnitude," the Court has held that compensation must be paid.[54] Although it has never attempted to delineate what constitutes a "certain magnitude," the Court has only required compensation in cases in which the value of the property was reduced

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53. 438 U.S. at 133-35 (citing Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Goldblatt v. Hempstead, 369 U.S. 590 (1962)).

54. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

drastically.[55] In *Penn Central*, for example, the Court sustained the application of the Landmarks Preservation Law despite the fact that the legislation denied the claimants income that would have been generated by a fifty-five story office building in midtown Manhattan.[56] The Court also cited approvingly cases in which the challenged law had reduced the value of the land by as much as seventy-five and eighty-seven percent.[57]

Mark-Garner asserts in its cross-claim that it purchased the land which now comprises Bensalem Village for approximately $3 million. As a result of the application of the zoning amendments, it alleges that the current market value of the property is about $2 million. In view of the Supreme Court's long-standing tolerance of much greater diminutions in value, the averments in the cross-claim do not set forth a colorable claim in this regard.[58] Since both elements of the taking calculus weigh heavily in favor of the constitutionality of the amendments' application to Bensalem Village, we conclude that the district court did not err in dismissing Mark-Garner's §1983 taking claim.[59]

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55. *See, e.g., id. See also* Armstrong v. United States, 364 U.S. 40 (1960) (government's complete destruction of a materialman's lien in certain chattels held to constitute a taking).

56. 438 U.S. at 131-32.

57. *Id.* at 131 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (75% diminution); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (87.5% diminution)).

58. We follow the Supreme Court's caveat in *Penn Central*, *see* note 51 *supra*, and limit our decision to the facts as alleged in Mark-Garner's cross-claim.

59. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), does not alter our analysis. There, the Court assumed that the plaintiffs had alleged a colorable "taking" claim under §1983 so that it could decide the question whether the Eleventh Amendment bars the federal courts from taking jurisdiction over an action brought against a bi-state commission. Because it was not raised in the petition for certiorari, the Court specifically reserved the question of the sufficiency of the complaint. *Id.* at 397

4. Procedural Due Process

Mark-Garner's final §1983 theory is that it was denied procedural due process. The developer alleges that the cross-defendants conspired to violate its substantive constitutional rights and that the supervisors announced publicly that they would take all steps necessary to stop the construction of Bensalem Village and similar real estate developments. Mark-Garner does not allege, however, that the Township's zoning and appellate procedures are constitutionally deficient or that the cross-defendants failed to comply with those procedures.

The due process claim against the Board of Supervisors is without merit because, in passing the amendments, the Board was acting in a legislative capacity. The amendments applied to all property within the R-4 district, not merely to Bensalem Village. They constitute general statements of Township policy rather than spe-

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n.11. We have found nothing in *Lake Country Estates* which suggests that the Court has reconsidered the "taking" analysis set forth in *Penn Central*.

The Supreme Court has recently granted certiorari in a case involving a challenge to local land use regulation. In Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *cert. granted*, No. 79-602, 48 U.S.L.W. 3426 (U.S. Jan. 8, 1980), the California Supreme Court sustained the dismissal of an inverse condemnation action for damages against the city. The court held that the proper remedy for an unconstitutional taking is a declaratory judgment or mandamus forbidding the illegal action, not damages. An action for damages, reasoned the court, would unduly usurp the legislative prerogative inasmuch as available alternatives — declaratory or mandamus relief — would permit the city to choose whether to terminate its application of the ordinance or to pay compensation. *See* Fulham & Scharf, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 Stan. L.Rev. 1439, 1450-51 (1974). The narrow question presented in *Agins* does not appear to be pertinent to the issues in this case. Of course, we can only speculate whether the Supreme Court, in the course of adjudicating *Tiburon*, will render a broader statement about taking challenges to zoning laws.

cific applications of policy to a particular landowner, and therefore can be characterized only as legislative acts.[60] Long ago, the Supreme Court decided that the protections of procedural due process do not extend to legislative actions. In *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*, 239 U.S. 441 (1915), the Court rejected a landowner's assertion that he had a due process right to a hearing before the State Board of Equalization voted on an order increasing by forty percent the valuation for tax purposes of all property in Denver. Writing for a unanimous Court, Justice Holmes observed:

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have

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60. General legislation of course can have a differential impact on certain groups of landowners. For example, an ordinance limiting the height of buildings will affect a landowner who is planning to build or is constructing a fifty story building differently than it will his neighbor who owns a renovated, three-story colonial townhouse. Similarly, Mark-Garner probably was more severely burdened by the zoning amendments than were other owners of land in the R-4 district who possess existing dwellings and who had no plans for new construction. That differential impact does not, however, change the character of the legislative act; nor does it entitle Mark-Garner, in its quest to nullify the legislation, to the protections of procedural due process. *See* text *infra*.

In contrast to legislative action is administrative action — the scope of which *is* limited by the due process clause. An example of an administrative act would be the denial of a variance, because such an act involves not only general policy considerations but also application of that policy to an individual landowner. *See, e.g.*, Tandy v. City of Oakland, 208 Cal. App. 2d 774, 42 Cal. Rptr. 283 (1965); text at pp. 26-30 *infra*.

Cf. South Gwinnett Venture v. Pruitt, 491 F.2d 5 (5th Cir.) (en banc) (county planning commission's denial of rezoning application held quasi-legislative and therefore not subject to procedural due process review), *cert. denied*, 419 U.S. 837 (1974). For a discussion of the legislative-administrative distinction, see generally, *Developments in the Law*, *supra* note 34, at 1508-13.

> a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. . . . There must be a limit to individual argument in such matters if government is to go on.

Id. at 445. *See Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) (city charter provision requiring proposed land use changes to be ratified by fifty-five percent of electorate does not violate due process rights of landowner applying for zoning change).

To provide every person affected by legislation the various rights encompassed by procedural due process — including hearings, opportunity for confrontation and response, clear standards, an impartial arbiter, and possibly judicial review — would be inconsistent with the structure of our system of government. The act of legislating necessarily entails political trading, compromise, and ad hoc decisionmaking which, in the aggregate, produce policies that at least approximate a fair and equitable distribution of social resources and obligations.

Absent an indication that this process inherently treats a particular class of persons inequitably,[61] it is unnecessary for the courts to intervene because the relatively large number of persons affected works to ensure that the legislature will not act unreasonably toward the populace.[62] In short, the general theory of republican

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61. *See generally* Ely, *The Supreme Court 1977 Term: On Discovering Fundamental Values*, 92 Harv. L. Rev. 5 (1978); Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 Md. L. Rev. 451 (1978).

62. *See generally* R. Dahl, A Preface to Democratic Theory (1956).

government is not due process through individual hearings and the application of standards of behavior, but through elective representation, partisan politics, and the ultimate sovereignty of the people to vote out of office those legislators who are unfaithful to the public will.[63] Inasmuch as the Supervisors, in passing the zoning amendments, were acting in a legislative capacity, Mark-Garner has no procedural due process claim against their actions.

We also conclude that Mark-Garner has failed to state a procedural due process claim in regard to the actions of the Zoning Officer and Zoning Hearing Board. Their actions were administrative in nature because they involved application of the Township's general zoning policies — as manifested in the amendments — to a particular parcel of land. Thus, Mark-Garner is entitled to claim the procedural protections of the due process clause in challenging the officials' refusal to grant it further building permits. The fatal flaw in the developer's claim in this respect, however, is that it fails to set forth any behavioral or structural allegations from which we can infer that Bensalem's process was unconstitutional.

Before a governmental body may deprive a landowner of a property interest, it must provide due process. The exact process required varies with the demands of the particular situation in question.[64] A balancing test has been articulated by the Supreme Court to determine the requirements of due process for any given situation: the private interest affected by the governmental action and the value of additional procedural safeguards are to be weighed against the fiscal and administrative burdens that additional procedures would impose on the government.[65] The Court has identified the following as

63. *See generally* Ratner, *The Function of the Due Process Clause*, 116 U. Pa. L. Rev. 1048 (1968).

64. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

65. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

elements of due process: (1) notice of the basis of the governmental action; (2) a neutral arbiter; (3) an opportunity to make an oral presentation; (4) a means of presenting evidence; (5) an opportunity to cross-examine witnesses or to respond to written evidence; (6) the right to be represented by counsel; and (7) a decision based on the record with a statement of reasons for the result.[66] Whether all or any one of these safeguards are required in a particular situation depends on the outcome of the balancing test mentioned above.[67]

In order to resolve this appeal, it is not necessary to decide exactly which procedural protections are mandated by due process in this instance. Rather, we hold that Mark-Garner's cross-claim, beyond making a general assertion of denial of due process, fails to allege that Bensalem's permit and appellate procedures were constitutionally deficient in any way.

The Pennsylvania legislature has enacted a system for processing challenges to zoning ordinances. The Zoning Officer, the primary administrator of the ordinance, is charged with execution "in accordance with its literal terms, and shall not have the power to permit any construction or any use or change of use which does not conform to the zoning ordinance."[68] The inflexible ministerial nature of the Zoning Officer's role is mitigated by the zoning appeals process. A landowner who wishes to challenge the validity of a zoning ordinance or amendment that restricts the use or development of its land may file a challenge with the Zoning Hearing Board[69] and may appeal from any decision by the Zoning Officer applying the ordinance.[70] The latter course may be taken when, as here, the landowner believes that the

66. *See* J. Nowak, R. Rotunda & J. Young, Constitutional Law 488-503 (1978) and cases collected therein.

67. *See* text at note 65 *supra*.

68. 53 Pa. Cons. Stat. Ann. §10614 (Purdon 1972).

69. *Id.* §§10910, 11003 and 11004.

70. *Id.* §10909.

Zoning Officer misapplied an applicable rule of law.[71]

The Zoning Hearing Board is an administrative-adjudicatory agency. Its members must be residents of the municipality, and are appointed by the Board of Supervisors for terms of three years.[72] Whenever an appeal or challenge to a zoning ordinance is brought to the Zoning Hearing Board, it is required by statute to conduct a hearing on the claim. Section 10908 of the Commonwealth's Municipal Corporations Code mandates that the Board provide the following procedures: (1) Notice must be given to the public, the Zoning Officer, and the person challenging the ordinance or action. (2) The Board or hearing officer must conduct the hearings and, unless the parties waive this right, the Board itself must make findings and render the decision on the merits. (3) The Board has the power to administer oaths, and to compel the appearance of witnesses and the production of documents requested by the parties. (4) Each party has the right to be represented by counsel. (5) Each party has the right to present evidence and argument, and to cross-examine adverse witnesses. (6) The Board is required to maintain a record of the proceedings. (7) Ex parte communication between the Board or the hearing officer and any party is prohibited. (8) The Board is required to publish its findings and conclusions within forty-five days of the last hearing.[73] If the landowner is dissatisfied with the Board's decision, it then has the right to appeal to the Court of Common Pleas.[74] The ap-

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71. *Id.* In this case, Mark-Garner appealed on the ground that the Zoning Officer had ignored decisions of the Court of Common Pleas interpreting 53 Pa. Cons. Stat. Ann. §10508(4) (Purdon 1972) as prohibiting application of the amendments to the Bensalem Village development. *See* note 5 *supra*. Section 10909 also provides landowners the right to proceed directly in the Court of Common Pleas.

72. *Id.* §10903 (Purdon Supp. 1979).

73. *Id.* §§10908 and 10910 (Purdon 1972 & Supp. 1979).

74. *Id.* §§11005(c), 11006(2)(c), 11008 (Purdon 1972 & Supp. 1979).

peal may either take the form of direct judicial review of the Board's decision, or the court may take new evidence and enter its own findings of fact after trial *de novo*.[75] The Court is authorized "to declare any ordinance or map invalid and to set aside or modify" any action, decision, or order of the Township, Zoning Officer, or Zoning Hearing Board.[76]

In Pennsylvania the procedure for challenging zoning ordinances substantially conforms with the general due process guidelines enunciated by the Supreme Court.[77] Mark-Garner acknowledges in its cross-claim that it submitted to this process — that it received a hearing, a decision on the merits by the board, and obtained judicial review of that decision. Indeed, on review, the Court of Common Pleas granted the developer the relief it requested.[78] Although it asserts that it was denied procedural due process during the course of the adjudication before the Zoning Hearing Board, Mark-Garner makes no specific allegation of deficiency in this process. As a consequence, and in view of the fact that Pennsylvania's system of adjudicating zoning challenges appears to be consistent with the requirements of due process, the district court did not err in holding that Mark-Garner fails to state a colorable procedural due process claim.

C. Sections 1985(3) and 1986

Mark-Garner's final federal claims arise under two provisions of the Ku Klux Klan Act of 1871, 42 U.S.C. §§1985(3) and 1986 (1976). The purpose of this Act was to place each newly freed black "on an equal footing before the law with his former master."[79] Section 1985(3)

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75. *Id.* §11010.

76. *Id.* §11011 (Purdon Supp. 1979). The standards for the judicial decision are also set forth in this section.

77. *See* text at notes 64-66 *supra*.

78. *See* note 4 and accompanying text *supra*.

79. Collins v. Hardyman, 341 U.S. 651, 661 (1951).

establishes a cause of action against any person who enters into a private conspiracy for the purpose of depriving the claimant of the equal protection of the laws.[80] Section 1986 is a companion to §1985(3) and provides the claimant with a cause of action against any person who, knowing that a violation of §1985 is about to be committed and possessing power to prevent its occurrence, fails to take action to frustrate its execution.[81] Because trans-

80. Section 1985(3) provides in relevant part:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

81. Section 1986 provides:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed; and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one,

gressions of §1986 by definition depend on a preexisting violation of §1985, if the claimant does not set forth a cause of action under the latter, its claim under the former necessarily must fail also.[82]

The Supreme Court's most thorough discussion of these sections was in *Griffin v. Breckenridge*, 403 U.S. 88 (1971). There, several black persons brought suit under §1985(3) alleging that the defendants, a group of white Mississippians, conspired and acted to deprive the plaintiffs of their equal rights by beating and threatening to kill them. The Court rejected the defendants' argument that the statute required state action, and interpreted it as covering purely private conspiracies as well.[83] To effect Congress' intent not to embrace all tortious conspiratorial interferences with the rights of others, however, the Court held that §1985(3) applied only to private conspiracies predicated on "racial, or perhaps otherwise class-based, insidiously discriminatory animus."[84]

We need not decide today whether §1985(3) embraces private conspiracies to discriminate on the basis

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and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

82. Brawer v. Horowitz, 535 F.2d 830, 841 (3d Cir. 1976); Hahn v. Sargent, 523 F.2d 461, 469-70 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976); Hamilton v. Chaffin, 506 F.2d 904, 914 (5th Cir. 1975).

83. 403 U.S. at 101. The Court noted that, in light of §1983, *see* part B *supra*, "[t]o read any [state action] requirement into §1985(3) would . . . deprive that section of all independent effect." *Id.* at 99.

84. *Id.* at 101-102. The Court specifically reserved the question whether a conspiracy motivated by an "invidiously discriminatory intent other than racial bias" would be actionable under §1985(3). *Id.* at 102 n.9.

of factors other than race.[85] At most, that statute proscribes private conspiracies to engage in discrimination that, but for the lack of state action, would violate the equal protection clause. Inasmuch as we have already concluded that the defendants did not deprive Mark-Garner of equal protection, we hold that the developer has not stated a cause of action under §§1985(3) and 1986. Consequently, the district court did not err in dismissing these claims.

D. Pendent State Claims

Along with the federal civil rights claims, Mark-Garner asserted several claims based on state and local law. In *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), the Supreme Court declared that federal courts have the *power* to entertain pendent state claims if the federal and state claims "derive from a com-

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85. Last term, in Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 99 S. Ct. 2345 (1979), the Supreme Court held that a conspiracy to deprive a person of a right created by Title VII, 42 U.S.C. §2000e (1976), cannot be the basis for a cause of action under §1985(3). *Compare* Glasson v. Louisville, 518 F.2d 899 (6th Cir.) (§1985(3) protects against discrimination based on political beliefs), *cert. denied*, 423 U.S. 930 (1975), *with* Bellamy v. Mason's Stores, Inc., 508 F.2d 504 (4th Cir. 1974) (§1985(3) does not provide redress for employee discharge because of Ku Klux Klan membership); *and* Milner v. National School of Health Technology, 409 F. Supp. 1389, 1395 (E.D.Pa. 1976) (employment discrimination based on gender within purview of §1985(3)) *with* Cohen v. Illinois Inst. of Technology, 524 F.2d 818, 829 (7th Cir.) (§1985(3) may not constitutionally be applied to redress sexual discrimination), *cert. denied*, 425 U.S. 943 (1976). *Cf:* McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977) (en banc) (§1985(3) provides redress only for conspiracies to discriminate by violating state or federal law).

We also have no occasion to decide whether persons acting in legislative capacities can "conspire" within the meaning of §§1985(3) and 1986. *See* Porter v. Bainbridge, 405 F. Supp. 83 (S.D.Ind. 1975).

mon nucleus of operative fact" such that the plaintiff "would ordinarily be expected to try them all in one judicial proceeding." The Court went on to observe, however, that "[c]ertainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."[86] In *Rosado v. Wyman*, 397 U.S. 397, 402-05 (1970), the Court modified this position somewhat in approving the district court's retention of pendent state claims after dismissing the federal claims for mootness. Because the district court had invested substantial time in the case prior to the federal claims becoming moot, the Court held that the trial judge had discretion to retain jurisdiction over the remaining state claims.[87]

Upon dismissing the federal claims in this action, the district judge declined to retain jurisdiction over the pendent state claims. In view of the fact that the dismissal of the federal claims occurred during the pleading stage of the proceedings, we find no abuse of discretion in this regard, and accordingly affirm the district court's decision.[88]

IV. CONCLUSION

In the past century the nation has witnessed the rise and decline of federal judicial protection of rights inhering in the ownership of interests in real property. Today, the Supreme Court affords state and local governments broad latitude in enacting and implementing legislation affecting the use of land. Implicit in this deference is the recognition that land-use regulation gener-

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86. 383 U.S. at 726.

87. 397 U.S. at 403. *See* Lentino v. Fringe Employee Plans, Inc., No. 78-1110, slip op. at 6-9 (3d Cir. filed Dec. 18, 1979).

88. Inasmuch as we affirm the district court's decision to dismiss the entire cross-claim, there is no occasion to discuss the questions of Eleventh Amendment immunity of the state officials raised by the defendants.

ally affects a broad spectrum of persons and social interests, and that local political bodies are better able than federal courts to assess the benefits and burdens of such legislation. Thus, absent defects in the process of enacting the legislation, or of manifest irrationality in the results flowing from that process, courts will uphold state and local land use regulations against challenges based on federal constitutional grounds.

Mark-Garner has advanced a broad series of federal statutory and constitutional challenges to the Township's retroactive application of the zoning amendments to the Bensalem Village project. The costs of delay incurred by the developer were indeed substantial. Yet, this factor alone does not permit us to afford relief where neither Congress nor the Constitution provides a basis for such remedial action. Despite its sweeping attempts, Mark-Garner simply does not state claims that would, if proved, entitle it to federal statutory or constitutional relief. Therefore, we hold that the district court did not err in dismissing the federal claims. And, because the trial judge did not abuse his discretion in dismissing the remaining pendent state claims, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHARON L. ROGIN & MICHAEL R. ROGIN, ANN MANGANO & WILLIAM MANGANO, JANET CASELLI & CHRISTOPHER CASELLI and MAUREEN BLASIC & JOSEPH BLASIC individually and on behalf of others similarly situated	:	CIVIL ACTION
v.	:	
BENSALEM TOWNSHIP and STEPHEN J. KELLY, THEODORE R. ZAJAC, WILLIAM MC FADDEN, HERBERT BRADEN and DONALD BELL, individually and in their official capacities as the Board of Supervisors of Bensalem Township and STANLEY HOROWITZ, individually and in his capacity as Zoning Officer of Bensalem Township and MARK-GARNER ASSOCIATES, INC., of PENNSYLVANIA	:	NO. 77-557

MEMORANDUM OF DECISION

MC GLYNN, J.

This is another zoning controversy in which the plaintiffs and defendant

cross-claimant sought to add the leverage of this court to their dispute with the township supervisors by alleging that their constitutional rights were violated as the result of the denial of additional building permits.

Plaintiffs are owners of condominium units in a project known as Bensalem Village. Defendant cross-claimant is the developer. The other defendants are Bensalem Township officials.

In 1973, when the developer obtained approval for construction of the project, the zoning ordinance allowed a density of 12 units per acre. Thereafter, utilities were installed and a number of units erected. In the meantime the zoning ordinance was twice amended by reducing the density from 12 units to 10 units per acre and then from 10 units per acre to 4 with the result that if

the developer had been held to the requirements of the most recent ordinance only 200 units would be constructed instead of 557 as originally contemplated.

The plaintiff unit owners contended that in such a case their pro rata contributions to the maintenance of the common facilities would be drastically increased and the developer argued that the new density requirements severely diminished the value of the project.

Plaintiff and cross-claimant allege that the defendants' actions deprived them of their property without due process of law and without compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution. It is also alleged that the defendants' actions constituted an impairment of the contractual obligations owed to the plaintiffs in violation of

Article I, Section 10, Clause I of the United States Constitution. Plaintiffs also claim violation of 42 U.S.C. §§1983 and 1985. Jurisdiction is grounded upon 28 U.S.C. §§1331 and 1343. Plaintiffs have also asked this court to accept pendent jurisdiction over a claimed violation of the Pennsylvania Constitution and plaintiff's contractual claims against defendant Mark-Garner.

The difficulty with the plaintiffs' position is that while they were pursuing their alleged constitutional claims in this forum, the Court of Common Pleas of Bucks County, on appeal, reversed the action of the Bensalem Zoning Hearing Board and directed the issuance of the building permits. (see Appendix attached). In essence, the court ruled that the amendments to the Zoning Ordinance were

not applicable to the Bensalem Village Project Units.

Therefore, plaintiffs have not been deprived of any property nor have their contracts been impaired in any way. As far as the cross-claimant Mark-Garner is concerned, it received all the process that was due by following the appeals procedure and ultimately prevailing.

Therefore, I can perceive no issue of constitutional dimensions requiring the intervention of this court.

But even assuming that the decision of the Bucks County Court of Common Pleas does not render this case moot, nevertheless the complaint and cross claim must be dismissed for failure to state a cause of action.

Bearing in mind that in this Circuit violations of the Civil Rights Act must

be pleaded with specificity Rotolo v. Borough of Charleroi, 532 F.2d 920 (3rd Cir. 1976); See also Bethel v. Jendoco Construction Corp., 570 F.2d 1168 (3rd Cir. 1978), I will proceed to an examination of the allegations.

The §1985 Claim

There are four specific elements which must be shown in order to successfully state a claim under 42 U.S.C. §1985: a conspiracy; for the purpose of depriving another of equal protection or equal privileges and immunities; any act in furtherance of the conspiracy committed or caused to be committed by a conspirator; whereby another was injured in his or her person or property or deprived of a right of privilege as a United States citizen. Bethel v. Jendoco Construction Corp., supra.

The plaintiffs allege that the supervisors conspired to deprive them of the use of their property, but the only action complained of was the failure of the Zoning Hearing Board to order the issuance of building permits. Standing alone, such conduct is not sufficient to make out a conspiracy to deprive plaintiffs of their constitutional rights.

Even if a conspiracy could be shown to exist, the complainants would still have to meet the additional burden of showing a discriminatory purpose.

> The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). A complaint alleging a §1985 violation must clearly show purposeful and intentional discrimination. Robinson v. Mc Corkle, 462 F.2d 111 (3d Cir. 1972). This the plaintiffs and cross-claimant have failed to do.

Constitutional Claims Under §1983

The plaintiffs contend that their rights under §1983[1] have been violated by the defendants and defendant township.

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1. Section 1983. Civil action for deprivation of rights.

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law suit at equity, or other proper proceeding for redress.

To establish a cause of action under §1983, the complainants must show that a constitutional right has been denied, Adickes v. S. H. Kress and Company, 398 U.S. 144 (1970).

The plaintiffs allege that the township and its officials deprived them of their property and property rights without due process of law in violation of the 5th and 14th Amendments to the United States Constitution.

The whole case of the plaintiff and the cross-claimant is bottomed on the "amendment to the zoning ordinance" but as noted above, those amendments are not applicable to Bensalem Village by reason of Section 508(4) of the Pennsylvania Municipalities Planning Code (53 P.S. p.508), In Re: Appeal by Mark-Garner Associates, Inc., etc., (App).

But once again, even assuming the amendments were applicable, the burden is on the plaintiffs to show that the zoning ordinance was an improper exercise of the police power. "An ordinance comes to the courts clothed with every presumption of validity." City of Ann Arbor Michigan v. Northwest Park Construction, 280 F.2d 212, 223 (6th Cir. 1960).

The preservation of open space, the restriction of excessive traffic, and the prevention of overcrowding are all legitimate goals, and density ordinances are reasonable means to accomplish these goals. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). In Euclid, supra, it was argued that the application of the zoning ordinance

greatly reduced land value, yet the Court upheld the zoning ordinance.

No facts are cited to substantiate the claim that "the amendments to the zoning ordinance are clearly arbitrary and unreasonable and "bear no substantial relation to the public health, safety, morals and general welfare." Such broad, conclusory, factually unsupported allegations are not sufficient to state a cause of action. Curtis v. Everette, 489 F.2d 516 (3rd Cir. 1973); Scott v. University of Delaware, 385 F. Supp. 937 (Del. 1974).

It is further alleged that the plaintiffs have suffered a constructive condemnation of their property without compensation. No taking of plaintiffs' property has occured. The plaintiffs are still fully able to enjoy their property. Furthermore, zoning ordinances

have been sustained even though they have an impact on property values. City of Eastlake v. Forrest City Enterprises, Inc., 426 U.S. 668 (1976). See also, Belle Terre, supra; Euclid, supra; Block v. Hirsh, 256 U.S. 135, 155.

Equal Protection

Plaintiffs, in their complaint, allege that defendants are depriving them of equal protection under the law. They claim that burdens and disadvantages imposed on them are not imposed on other residents of Bensalem Township.2 Cross claimant developer alleges unequal treatment with regard to other developers in the area. Nowhere, however, do the parties allege that their development is being treated differently than any other R-4 zoning district under the

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2. Paragraph 34 of plaintiffs' complaint.

Bensalem Zoning Ordinance. The classification of a municipality into different zoning districts with different regulations has been upheld since Euclid, supra. The parties have alleged no facts to show that such classifications are in any way unreasonable or arbitrary and therefore this claim must fail.

Impairment of Contract

Plaintiffs allege that the municipal defendants have impaired the contractural obligations between themselves and the developer in violation of the Art. 1, §10, cl. 1 of the United States Constitution. They claim that this contractual relationship was based upon a projected project size which supported the expectations of the plaintiffs with regard to the monthly assessments for the ownership of their individual units. These monthly assessments were based

upon the anticipated costs of maintaining the common facilities, said costs to be shared among five hundred fifty seven households.

Whether or not there was a definite contract with regard to the maintenance costs, this court will not have to decide since the police power of the state can impair the obligations of a contract entered into prior to such an exercise. Home Building and Loan Association v. Blaisdell Minn., 290 U.S. 398 (1934); Koch v. Yunich, 533 F.2d 80 (2d Cir. 1976).

> The constitutional protection of the obligation of contracts is necessarily subject to the police power of the state, and therefore a statute passed in the legitimate exercise of the police power will be upheld by the courts, although it incidently destroys existing contract rights.

De Paul v. Kauffman, 441 Pa. 386, 399,

272 A.2d 500, 506 (1971) citing Zeuger Milk Co. v. Pittsburgh School District, 334 Pa. 277, 280, 5 A.2d 885, 886 (1939).

Pendent State Law Claims

In addition to asserting claims under the federal law, plaintiffs have invoked this court's pendent jurisdiction to hear state law claims for breach of contract and for violation of Art. I, §17 of the Commonwealth of Pennsylvania.3 Since the impairment of contract issue has already been dealt with both as a state and federal claim, the only question remaining is whether this court should accept pendent jurisdiction in order to hear the plaintiffs' claim against the developer for breach of contract.

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3. Art. I, §17. No expost facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant or special privileges or immunities shall be passed.

Whether or not to hear a pendent state claim is left to the court's discretion and is based on considerations of "judicial economy, convenience and fairness to the litigants." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

However, since there is no independent basis for the exercise of federal jurisdiction over the parties, the court will not retain jurisdiction of the pendent state claims. Aldinger v. Howard, 427 U.S. 1 (1976).

Accordingly, the complaint and cross-claim will be dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHARON L. ROGIN, et al.,	:	CIVIL ACTION
Plaintiffs	:	
v.	:	
BENSALEM TOWNSHIP, et al.,	:	
Defendants	:	NO. 77-557

ANSWER OF DEFENDANT, MARK-GARNER ASSOCIATES, INC. AND CROSS CLAIM

42. Admitted.

43. Admitted.

44. Admitted that there will be an increase in the common expenses. The total increase will ultimately depend on the number of dwelling units constructed.

45. Denied. The defendant, MARK-GARNER ASSOCIATES, INC., is ready, willing and able to complete the project as set forth in the Declaration of Condominium. The inability of the

defendant to proceed has been caused by the malicious, arbitrary and capricious conduct of the defendant, BENSALEM TOWNSHIP, and the named Supervisors and the Zoning Hearing Board of Bensalem Township and its members, Jimmie L. Stewart and Thomas Walls who have conspired to deprive the defendant and plaintiffs of its property and property rights without due process of law and in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Title 42 of the United States Code, §§1983, 1985 and 1986.

46. Denied. Defendant, MARK-GARNER ASSOCIATES, INC., has, is and has always been ready, willing and able to proceed with the development and any legal fees necessitated by this litigation are the direct result of the illegal, malicious, arbitrary and

capricious conduct of the Township, Supervisors, Zoning Board and any of its members acting in concert to deprive the defendant, MARK-GARNER ASSOCIATES, INC., and the plaintiffs of their constitutional and civil rights.

WHEREFORE, defendant requests that the suit against it be dismissed.

CROSS CLAIM

(Against Defendants in the Above-Captioned Matter and Additional Defendants, BENSALEM TOWNSHIP ZONING HEARING BOARD, JIMMIE L. STEWART and THOMAS WALLS, Individually)

Jurisdiction

The acts of the defendants as set forth herein constitute a violation of Title 42 of the United States Code, Sections 1983, 1985 and 1986 and the due process and equal protection provisions of the Fifth and Fourteenth Amendments of the Constitution of the

United States. Jurisdiction is conferred in this Court pursuant to Title 28 of the United States Code, Sections 1331, 1343, 2201 and 2202 and pursuant to Rule 13 of the Federal Rules of Civil Procedure. The sum in controversy exceeds $10,000.00, exclusive of interest and costs.

Parties

1. The parties to this Cross Claim are identical to the parties in the above-captioned matter with the additional defendants, Bensalem Township Zoning Hearing Board and its members, Jimmie L. Stewart and Thomas Walls, who are named as defendants in this cross claim both individually and in their official capacities.

2. Defendant, Bensalem Township Zoning Hearing Board, is a separate body

politic with its principal place of business at 3800 Hulmeville Road, Cornwells Heights, PA 19020 (hereinafter called "Board").

3. Jimmie L. Stewart is the Chairman of the Board appointed by the Supervisors and is sued in his individual and official capacity and resides at 281 High Road, Cornwells Heights, PA.

4. Thomas Walls is a member of the Board appointed by the Supervisors and is sued in his individual and official capacity and resides at 1083 Colonial Avenue, Cornwells Heights, PA.

CLAIM

Defendant, MARK-GARNER ASSOCIATES, INC., by its attorneys, brings this Cross Claim seeking preliminary and permanent injunctive relief, declaratory judgment and monetary damages

against the defendants and complains and alleges as follows:

5. On May 16, 1973, the Supervisors granted final approval to the defendant's plan of development known as "Bensalem Village" for 557 Townhouse dwelling units to be sold under the condominium form of ownership.

6. As a requirement of the final approval, the defendant was required to enter into an agreement with the Township guaranteeing the installation of improvements for the entire development of 557 dwelling units in the amount of $215,000.00, which agreement was executed by the Township and the defendant.

7. On August 15, 1973, defendant had recorded its final approved plan in the Office of the Recording of Deeds of Bucks County in Plan Book 112, Pages

47 through 50, and an amended plan approved by the Township was recorded on December 14, 1973, in Plan Book 117, Page 21.

8. Pursuant to the provisions of the "Unit Property Act" of the Commonwealth of Pennsylvania, which regulates condominiums, a required Declaration of Condominium and Rules and Regulations were recorded in the aforesaid Office of the Recorder of Deeds in Deed Book No. 2098, Page 7.

9. In reliance upon the finally approved plans, and pursuant to validly issued building permits, construction of Bensalem Village was commenced in the Spring of 1973.

10. The defendant has installed sanitary sewer and storm water facilities to service 490 dwelling units, which

facilities have been inspected and approved by the appropriate officers and officials of the Township and the Bensalem Township Sewer and Water Authority, all of which were and are sized for 557 families.

11. The defendant has constructed and installed 30% of the perimeter chain link fence required with the final plan approval.

12. Defendant has installed 30% of the street lighting required under the approved plan.

13. The defendant has installed 30% of the required underground electrical and telephone wiring.

14. The defendant has constructed 45% of the TV coaxial distribution system including an 80 foot tower, antenna and amplifiers. The

defendant has completed the landscaping of more than 30% of the development.

15. The defendant has completed and installed the recreation building, swimming pool, tennis courts, basketball court and other facilities to serve the entire development as approved by the Township sized for use and support by 557 families.

16. To date, defendant has expended in excess of $3,000,000.00 in reliance upon the final plan approval granted by the Township and the issuance of building permits for ground acquisition, engineering and attorneys' fees, installation of site improvements.

17. To date defendant has completed, sold, and settled approximately 106 townhouse units under the condominium form of ownership out of a total of 557

townhouse dwelling units approved by the Township. Subsequent to the final plan approval granted by the Township to the defendant for Bensalem Village, the Township amended the R-4 zoning classification, which is the designation of the defendants' lands, from 12 dwelling units per acre, which is the density approved for Bensalem Village, down to 10 dwelling units per acre.

18. Since June of 1973 through September of 1976, the defendant has been issued from time to time, upon request, zoning and building permits for the erection of dwelling units at Bensalem Village pursuant to the approved plan.

19. Since the commencement of construction through September of 1976, defendant has continually proceeded with the plan of development constructing

those dwelling units in advance of sales as permitted by the Construction Lender, Mid-Atlantic Mortgage Corporation.

20. On September 24, 1976, in the normal course of business, defendant applied to Stanley Horowitz, Zoning Officer of Bensalem Township, for building and zoning permits for dwelling units numbers 434 through 439, and units 445 through 450.

21. Mr. Horowitz thereafter illegally rejected the defendant's request for building permits, having been instructed to do so by the Township Supervisors.

22. The notice of rejection indicated that the defendant did not meet the requirements of Article 5 Section 522, Subsection 1 of the Bensalem Township Zoning Ordinance. The rejection further

stated that in order to comply with the aforesaid Section, the defendant must reduce the maximum density of dwelling units from the approved 12 dwelling units per acre to 10 units per acre. The defendant was further instructed that he must submit a new land development and subdivision plan for approval by the Township.

23. On or about October of 1976, the Supervisors again amended the R-4 Zoning Classification by further reducing the density provisions from 10 dwelling units per acre to 4 dwelling units per acre. As a result of the notice of rejection issued by Mr. Horowitz, the defendant on or about October 12, 1976, filed an appeal with the Zoning Hearing Board of Bensalem Township from the aforesaid denial of the request for zoning and building permits.

24. The Board scheduled a hearing for the said appeal on the evening of November 9, 1976, at which time the defendant appeared for the purpose of introducing testimony and concluding said appeal hearing. The defendant's case was not reached that evening by the Zoning Hearing Board and the matter was scheduled for December 7, 1976.

25. On the evening of December 7, 1976, the defendant's case was heard commencing at 9:30 P.M. and at 11:00 o'clock P.M. the defendant was informed that the Board would hear no further testimony of the defendant's case in order that other matters scheduled for that evening could be heard prior to the Board's 12:00 P.M. (sic) adjournment deadline. The termination of the defendant's case was strenuously objected to by counsel for the defendant.

26. On December 21, 1976, the defendant's case was rescheduled at which time the hearing was completed.

27. As a result of the legal issues raised at the hearings during the defendant's case, the Solicitor to the Board issued an opinion wherein he advised the Board that the appropriate legal action would be to grant a reversal of the zoning officer's actions.

28. Contrary to the advice of the Board's Solicitor the members of the Board, Jimmie L. Stewart and Thomas Walls, at a public meeting held on January 4, 1977, denied defendant's appeal and sustained the zoning officer's denial of the requested building permits.

Civil Rights Violations

29. Plaintiff incorporates

herein by reference thereto the averments of paragraphs 5 through 28 above, as though the same were set forth in full.

30. The defendants, acting under color of state statute, ordinance and/or regulation entered into a continuing combination and conspiracy among themselves and others unknown to defendant, MARK-GARNER ASSOCIATES, INC., intentionally and purposely, wrongfully, unlawfully and vindictively violating defendant's constitutional and civil rights and, (a) deny the substantive and procedural protections guaranteed by the due process clause of the Fourteenth Amendment of the United States Constitution and by state and local statute and ordinances; (b) to diminish and/or destroy the value of defendant's property for the use of the construction of the proposed residential development;

(c) to delay, impede, hinder and prevent the defendant from exercising its rights under state and local zoning and related laws to build and develop residential community property so as to make the development of the defendant's project more costly with the intention thereby preventing defendant from building the proposed residential development at the densities permitted under the zoning ordinance in effect at the time when final approvals were granted and when construction was well under way; all such acts having been done for the purpose of denying defendant's constitutional and civil rights.

31. The defendants, Stephen J. Kelly, Theodore R. Zajac, William McFadden, Herbert Braden and Donald Bell, as individuals and as Township Supervisors, have openly announced that

each of them, individually and as Township Supervisors, will take any and all actions necessary to stop this and other developments whether such conduct is unlawful or permissable, and where such conduct is appealed to the Courts of the Commonwealth of Pennsylvania, to engage in dilatory tactics in order to discourage this and other developments, if not directly then indirectly, by causing excessive delays, legal costs, increasing the amounts of interest and discouraging sales, thus depriving the landowner of rights guaranteed by the Constitution of the United States by the use of their power as municipal officials to cause the municipality to engage in illegal and oppressive behavior in violation of the statutes of the United States, those of the Commonwealth of Pennsylvania and its own Ordinances to this defendant and to the plaintiffs

herein, full well knowing that each such act cannot be appealed without bankrupting the defendant and each plaintiff while the defendant Supervisors use the public treasury of the Township as a defense fund.

32. Defendants, acting under color of state law, as more fully described above, have unlawfully taken defendant's property without due process of law and have arbitrarily and discriminatorily denied defendant the equal protection of the state and local zoning and similar laws, all in violation of plaintiff's rights and privileges secured by the Constitution of the United States.

33. Individual defendants had at all relevant times knowledge of the wrongs herein alleged as planned and done to the defendant and had the power,

under color of state law, to prevent infliction thereof by the proper use of their respective positions.

34. Each and all of such individual defendants failed and refused to aid defendant or to prevent such wrongs and still continue to do so, thereby participating in the continuing infliction of such violation of the defendant's rights in intentionally causing the damages to defendant referred to herein.

35. Defendant, in reliance upon its constitutional rights to have the local and state laws governing the building of the proposed residential development on defendants' property applied to it equally, fairly and without discrimination by the Township and Zoning Hearing Board, and its right not to have those rights unlawfully interfered with by defendants has incurred, and unless

defendants are restrained, will continue to incur great expenses for which it seeks damages from defendants as set forth below.

36. All acts of defendants, individually and/or acting in concert, were done knowingly and with actual malice and/or recklessly with the specific purpose of denying defendant its civil and constitutional rights under state and local laws and the Constitution of the United States.

37. Based on information and belief, defendant avers that, as a result of said conspiracy, defendants unless restrained by this Court, will continue to deny defendant its civil and constitutional rights under state and local laws and the Constitution of the United States.

38. As a direct result of defendants' willful, arbitrary, capricious, vindictive and unlawful actions, defendant has suffered and unless defendants are restrained, will continue to suffer on a daily basis, irreparable damage to its business and business reputation.

39. As a direct result of defendants' willful, arbitrary, capricious, vindictive and unlawful actions, defendant has suffered and unless defendants are restrained, will continue to suffer on a daily basis irreparable harm in that it is unable to proceed with its commitments to the owners of the Bensalem Village development and is unable to sell the completed units in Bensalem Village.

40. As a direct result of defendants' willful, arbitrary,

capricious, vindictive and unlawful actions, defendant has suffered and unless defendants are restrained, will continue to suffer on a daily basis financial damages for which it claims recovery against each individual jointly and severally as follows:

(a) The cost of defendant for the fair market value of defendant's property in an amount in excess of $3,000,000.00.

(b) The difference between the value of defendant's property with site plan and zoning approval for the construction of 557 townhouse dwelling units and its current fair market value without that approval in an amount in excess of $2,000,000.00.

(c) Interest, carrying charges and increased labor and material costs,

all being incurred and to be incurred by defendant in the construction of the development as those expenses have accrued and will accrue from September 1976 to present in an amount in excess of $96,000.00.

(d) Loss of profits caused by delays in construction and sales program to date $87,400.00.

(e) Increased costs of construction to date in excess of $96,000.00.

(f) Legal expenses in excess of $50,000.00.

(g) Liability to current owners of dwelling units in Bensalem Village.

(h) Damage to defendant's business and business reputation as a

developer of residential communities an amount in excess of $1,000,000.00.

(i) Other direct and consequential damages, the exact amounts of which are currently unknown to defendant, which defendant believes and therefore avers would exceed $250,000.00.

41. The conduct of defendants in denying defendant its constitutionally guaranteed rights was willful, malicious and vindictive and without any legal basis whatsoever.

42. Since defendants' conduct was of a willful, malicious and unlawful nature, defendant is entitled to punitive damages against each individual defendant in an amount of $250,000.00.

43. Because of the unlawful nature of defendants' conduct, defendant

is entitled to reasonable attorneys' fees and therefore prays for such fees in the amount of $50,000.00.

Relief Sought

WHEREFORE, defendant requests that:

A. The Court issue a declaratory judgment against defendants, declaring unlawful:

(1) The action by the zoning officer in failing to issue zoning and building permits for the previously approved townhouse dwelling units at Bensalem Village.

(2) The action of the Township Supervisors, zoning officer and Zoning Hearing Board and the individual defendants, in failing to issue the defendant's building permits

pursuant to the previously approved plan of development.

B. The Court issue a preliminary and permanent injunction:

(1) Directing the defendants, and their respective officers, agents, employees and attorneys and all persons and/or entities in active concert or participation with them to:

(a) Forthwith cease and thereafter refrain from taking any action whatsoever for the purpose of or with the result of denying defendant's rights to have the Bensalem Village development completed.

C. Awarding defendant compensatory damages against each and all the individual defendants in excess of $3,000,000.00 as further outlined in paragraph 40 of this Cross Claim.

D. Awarding to defendant punitive damages against each and all the individual defendants for malicious and unlawful conspiratory acts that they perpetrated upon defendant in an amount of $250,000.00 as further outlined in paragraph 40.

E. Awarding to defendant the costs and disbursements of this action as well as reasonable attorney fees in the amount of $25,000.00.

F. Awarding to defendant such other and different relief as the Court may deem just and equitable.

PECHNER, DORFMAN, WOLFFE, ROUNICK AND CABOT

BY: _____
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